INDEX

	Page
Questions Presented	1
Statement	2
Argument	7
I. The Intervention Issue	8
II. The Stay Issue	16
Conclusion	17
Appendix	1a

TABLE OF AUTHORITIES CITED

CASES:

Algonquin Gas Transmission Co. v. Federal Power Comm'n, 201 F.2d 334 (1st Cir. 1953) 9, 10, 11, 14

Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137 (1944) 16

Amalgamated Meat Cutters v. National Labor Rel. Bd., 267 F.2d 169 (1st Cir.), *cert. denied sub nom.*, Geilich Tanning Co. v. Amalgamated Meat Cutters, 361 U.S. 863 (1959) 14

Brotherhood of Railway Trainmen v. Baltimore & O. R. Co., 331 U.S. 519 (1947) 14

Delta Air Lines, Inc. v. Civil Aeronautics Bd., 275 F.2d 632 (D.C. Cir. 1959), *cert. denied sub nom.*, Trans World Airlines, Inc. v. Delta Air Lines, Inc., 362 U.S. 969 (1960) 12

Foti v. Immigration & Naturalization Service, 84 Sup. Ct. 306 (1963) 8

Halestone Drug Stores, Inc. v. National Labor Rel. Bd., 190 F.2d 1022 (9th Cir. 1950), *cert. denied*, 342 U.S. 815 (1951) 15

Moffat Tunnel League v. United States, 289 U.S. 113 (1933) 9

National Airlines, Inc. v. Northeast Airlines, Inc., No. 63-693-Civil (S.D. Fla.) 6

Page

New York-Florida Case, 24 C.A.B. 94 (1956) 2
New York-Florida Renewal Case, C.A.B. Docket 12285 *et al.* 2
Order E-19910 (August 15, 1963) 2, 3, 4
Order E-20073 (October 8, 1963) 3
Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953) .. 14, 16
Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479 (1930) 9
Sam Fox Publ. Co. v. United States, 366 U.S. 683 (1961) 13
Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951) 13, 16
Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944) 14, 16

STATUTES AND RULES:

Federal Aviation Act:

Section 102, 49 U.S.C. § 1302 3
Section 1006, 49 U.S.C. § 1486 ..... 9, 10, 1a
Section 1007, 49 U.S.C. § 1487 ... 5, 6, 10, 12, 13, 2a
Section 1009, 49 U.S.C. § 1489 ..... 10, 3a

Rule 1, Federal Rules of Civil Procedure 10

Rule 24(a)(2), Federal Rules of Civil Procedure 10, 11, 13

Rule 15(d), Rules of Practice in Economic Proceedings of the Civil Aeronautics Board, 14 C.F.R. § 302.15(d) 9

MISCELLANEOUS:

1 Davis, *Administrative Law* 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 720

IN THE MATTER OF THE
PETITION OF EASTERN AIR LINES, INC.

NORTHEAST AIRLINES, INC.

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR NORTHEAST AIRLINES, INC., IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the court below abused its discretion by limiting petitioner to participation as *amicus curiae* in proceedings to review an administrative order, where petitioner's only interest in the order is that it would

end the authority of Northeast Airlines to operate on routes also served by petitioner and another carrier, and where many of the forty participants in the administrative proceeding could present a far more compelling claim for intervention in the review proceedings.

2. Whether the court below abused its discretion in staying that order *pendente lite* and providing that the stay would be effective at least to a date certain (April 30, 1964) which will come well before the review proceedings can be concluded.

STATEMENT

By the narrow margin of 3 to 2, the Civil Aeronautics Board ("Board") on August 15, 1963, refused to make permanent the temporary authority it had granted in 1956 to Northeast Airlines, Inc. ("Northeast") to serve as a third carrier, along with Eastern Air Lines, Inc. ("Eastern") and National Airlines, Inc. ("National") in the heavily-traveled East Coast-Florida market. The Board thereupon issued its Order E-19910 terminating Northeast's authority to operate south of New York, effective on October 14, 1963. *New York-Florida Renewal Case*, C.A.B. Docket 12285 *et al.* The basis of the Board's decision was its conclusion that three carriers were not needed on the route—a complete reversal of the unanimous conclusion of the Board in 1956 that three carriers were needed (*New York-Florida Case*, 24 C.A.B. 94 (1956)) and of the conclusion of the trial examiner in the renewal proceedings that three carriers are still needed. In the words of the dissenters, the majority decision was "without precedent . . . not supported by the record and . . . contrary

to the statutory" mandate of competition in § 102 of the Federal Aviation Act. (49 U.S.C. § 1302).[1]

Northeast and others filed petitions for reconsideration or stay of Order E-19910, but on October 4, 1963, when only five business days remained before the date set by the Board for termination of Northeast's service south of New York, the Board still had not acted on those petitions. Therefore, Northeast filed a petition for review with the Court of Appeals for the First Circuit and applied for the stay necessary to permit Northeast to continue operating pending judicial review. As Northeast showed the court below, a stay was needed to prevent irreparable injury to Northeast, to preserve the jurisdiction of the Court of Appeals to correct the errors of the Board, and to protect the public interest. Northeast further pointed out that, because of the practical realities of Florida winter vacation travel, particularly the desire of vacationers to be certain of their return reservations, such a stay *pendente lite* had to include a date certain in order to be effective.[2]

On October 8, 1963, the Board, still divided 3-2, issued Order E-20073, denying the petitions for recon-

---

[1] Board Order E-20073, Concurring and Dissenting Opinion, p. 2. The dissenters found that the need for a third carrier was supported not only by the record in the renewal proceedings, but also by "the Board's experience and decisions over the past twenty-five years." *Ibid.*

The United States also has taken the position that three carriers are required. Petition of the United States for Reconsideration and Reargument and for a Stay of the Decision and Order E-19910, p. 8.

[2] See Northeast's verified motion for a stay which is printed as Appendix A to Northeast's brief in opposition in No. 756 Misc.

sideration but postponing the effective date of Order E-19910 from October 14 to November 15, 1963. Contemporaneously, Eastern and National, two of the forty participants in the Board proceedings, both filed motions to intervene in the court below and also proffered voluminous oppositions to the application for a stay. Two organizations representing employees of Northeast—the Master Executive Council of Northeast Pilots and the International Association of Machinists, similarly participants before the Board—also sought to intervene and tendered papers in support of the stay application.

On October 17, 1963, the court below, after considering all papers submitted, including those filed and proffered by Eastern and National, entered orders (1) staying Order E-19910 pending the review proceedings and, "because of the peculiar nature of this particular case", at least to April 30, 1964, and (2) denying all four motions to intervene "at this stage". Pet. App. A, pp. 21-23.

In the three months following the October 17 orders of the court below, Eastern and National have launched against those orders an inconsistent series of harassing attacks. Those attacks have involved four distinct proceedings in three different federal courts. Inevitably, defending on so many fronts has diverted and wasted the resources of Northeast. And those diversionary attacks have tended to create an aura of confusion and uncertainty around the judicial review proceedings in the court below, the stay entered by that court, and the authority of Northeast to operate pursuant to that stay.

The series began on October 25, 1963, just eight days after the orders were entered, when both Eastern and

National filed in the court below motions for reconsideration of the order denying them leave to intervene (but not of the stay order). On November 6, 1963, the court below granted Eastern and National leave to participate as *amici curiae* and otherwise denied reconsideration of the order denying intervention. Pet. App. A, p. 24.

Eastern, without waiting for the court below to act on its motion for reconsideration, filed on November 5, 1963, its application to this Court for extraordinary writ of common law certiorari (No. 756 Misc.) seeking review only of the stay. Early in December, briefs in opposition to that application were filed by Northeast and by labor organizations representing its employees, and the Acting Solicitor General submitted a memorandum for the Board suggesting that the stay was "not of sufficient practical importance to warrant consideration here." On December 31, 1963, after all papers had been before this Court for almost a month—when action on the application was presumably imminent—Eastern moved to withdraw that application.

On the same day Eastern replaced that application with the present petition, which is no more than a carbon copy of that application with an argument as to intervention superimposed. National followed by filing on January 15, 1964, its petition, No. 766, which raises only the intervention issue.

Meanwhile, on December 11, 1963, National had instituted a collateral attack on the orders of the court below in the guise of an action in the Southern District of Florida under § 1007 of the Federal Aviation Act[3] to

[3] 49 U.S.C. § 1487, quoted in Appendix, *infra*.

enjoin Northeast's operations to and from Florida. *National Airlines, Inc.* v. *Northeast Airlines, Inc.*, No. 63-693-Civil. Northeast moved to dismiss the Florida litigation on various grounds, including lack of jurisdiction. Then, on Christmas Eve, Eastern joined as a plaintiff in that action. After hearings on December 27, 1963, and January 2, 1964, and numerous briefs, the court granted Northeast's motion to dismiss on January 10, 1964.

The contention of Eastern and National in the Southern District of Florida that Northeast's operations might be enjoined pursuant to § 1007 despite the pendency of the review proceedings and the stay issued by the court below was wholly inconsistent with their claims in this Court that they should be allowed to intervene because they are "bound" by the orders of the court below. Nevertheless, although Eastern entered the Florida litigation a full week before the present petition was filed, Eastern has never informed this Court of that litigation. Nor does National make any reference thereto in its petition, No. 766. Neither Eastern nor National can justify to this Court the inconsistent positions they have taken and may be continuing to take.[4]

The review proceedings below are to be argued on the merits in March, and Northeast has filed its brief therein. It is imperative to Northeast that the merits be decided as quickly as possible. Northeast's routes south of New York account for approximately 80 per-

[4] Neither Eastern nor National has indicated whether it intends to appeal to the Fifth Circuit from the order dismissing the Florida litigation.

cent of Northeast's present business volume, and so long as their status is uncertain and involved in litigation, it is difficult for Northeast to maintain the public acceptance that it has achieved in the East Coast-Florida market over the years since 1956, and it is impossible for Northeast to make future business plans.[3] Northeast accordingly wishes to avoid delay in the determination of the merits below.

ARGUMENT

The tactics employed by Eastern speak for themselves—the failure to raise the intervention point in No. 756 Misc.; the eleventh hour withdrawal of that petition and its replacement by the present No. 720, which repeats the arguments for review of the stay and belatedly asks for review of the denial of intervention; the presentation of inconsistent arguments to the Florida district court and to this Court; and the failure to inform this Court of the Florida litigation. These tactics color, we submit, Eastern's entire presentation and point up the obvious weakness of its petition—the lack of any real substance in the issues it asks this Court to hear.

Thus, Eastern, although it has not been permitted to intervene below, was fully heard on the question of stay and, as an *amicus curiae*, has full opportunity to submit to the court below any relevant contentions on the merits. Similarly, it is clear that the judicial review proceedings will still be pending on the date certain specified in the stay (April 30, 1964). In short,

[3] Cf. Northeast's verified motion for a stay which is printed as Appendix A to its brief in opposition in No. 756 Misc.

Eastern is crying over hypothetical spilled milk: The questions raised are abstract as well as insubstantial; they are of no practical significance to the judicial review proceedings and Eastern has not really been hurt.[6]

As the Board suggests, neither of the issues presented by the Eastern and National petitions "is of sufficient practical importance, in the present context of the case, to warrant consideration at this time . . . ." Memorandum for the Board, p. 4. Moreover, both the stay and intervention issues are matters which, in the context of judicial review of Board orders, are committed to the discretion of the court below in the light of the particular facts of this case. Here the court below certainly cannot be charged with abuse of that discretion and even if it could, such a charge would present no question of general importance warranting review.

I. *The Intervention Issue.* The orders denying Eastern leave to intervene "at this stage" do not warrant the attention of this Court. As will be developed, they rested in the sound discretion of the court below.

---

[6] Eastern's petition itself discloses the anomaly of its position. On the one hand, it complains that the stay ordered by the First Circuit and the extension granted by that court for the filing of briefs are daily causing Eastern financial injury. Yet it seeks to interrupt and thereby delay the First Circuit's review—a form of statutory review tailored to "abbreviate the process of judicial review", see *Foti* v. *Immigration & Naturalization Service*, 84 Sup. Ct. 306 (1963)—by asking this Court to consider interlocutory orders prior to determination of the merits in that review.

The Memorandum for the Board points out that plenary review of the intervention issue "now would seemingly make for delay rather than for expedition" (p. 4). That is a consequence which Northeast is most anxious to avoid because of its need for prompt decision on the merits.

there being no statute or rule providing for a "right" to intervene in this case. Eastern fails to show any abuse of that discretion, particularly since it has been given leave to participate as *amicus*. Review is further inappropriate because Eastern's petition is premature.

1. Simply stated, Eastern claims that its participation as an intervenor before the Board in the proceedings involving Northeast's renewal application for certificate authority gives it the right to intervene in judicial review of that order. Yet it has been held repeatedly that no right to judicial review accrues as the result of intervention before the agency. *E.g., Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479 (1930); *Moffat Tunnel League* v. *United States*, 289 U.S. 113 (1933).[7] The Federal Aviation Act does not confer any right to intervene in judicial review of Board orders conducted pursuant to § 1006 of the Act.

---

[7] In a similar situation involving review of an administrative order under a statute which, like the Federal Aviation Act, does not provide for intervention, it was held that:

> "[N]othing in the Act makes it mandatory upon a court of appeals, on review of a Commission order, to allow applications for leave to intervene, merely because the applicant had been admitted as a party to the administrative proceeding below." *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, 201 F. 2d 334, 342 (1st Cir. 1953).

Similarly, the Board's Rules of Practice in Economic Proceedings specifically provide that grant of leave to intervene before the Board shall not "be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order . . . as will entitle it to judicial review of such order." 14 C.F.R. § 302.15(d).

49 U.S.C. § 1486.[8] Nor does the Administrative Procedure Act speak on this subject. In short, the "right" which Eastern claims to have been denied is not granted by statute and has not been recognized by the courts. In the absence of some provision for intervention, when a Court of Appeals is presented with a motion to intervene in a judicial review of an administrative order, the "matter lies within . . . [its] discretion." *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, 201 F.2d 324, 342 (1st Cir. 1953); 1 Davis, *Administrative Law*, § 8.11, pp. 571-572.

In an effort to distort the First Circuit's discretionary choice into an appealable denial of a right, Eastern purports to find a *right* to intervene in the Court of Appeals' proceeding in Rule 24(a)(2) of the "Federal Rules of Civil Procedure *for the United States District Courts.*" (Emphasis added.) Eastern's contention is belied by the very title of those Rules, and by Rule 1 which specifies that those Rules govern "the procedure in the United States *district* courts." (Emphasis added.) In exercising their discretion, Courts of Appeals may advert to the Rules for appropriate analogy, see *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, *supra*, at 342, but the Rules themselves do not purport to govern, and have not

---

[8] In fact, insofar as the Act concerns itself with judicial intervention, it shows an intent to make intervention discretionary and not a matter of right. Section 1007 of the Act, 49 U.S.C. § 1487, gives private parties in interest the right to bring suits to enjoin violations of competing carriers' certificate authority. But where the Board institutes such actions, Section 1009, 49 U.S.C. § 1489, merely makes it "lawful" for a court "to permit the intervention" of interested and affected parties. See Appendix, *infra*, for the text of §§ 1006, 1007 and 1009.

been construed as governing procedure in the Courts of Appeals. Significantly, with one exception, Eastern's petition relies wholly on cases concerning intervention before District Courts to support its contention that Rule 24(a)(2) creates a "'right" of intervention in the present case. The exception is the *Algonquin* case, *supra*, which explicitly held that intervention in Court of Appeals is a matter for that court's discretion. 201 F.2d at 342.

2. Even if Eastern is given the benefit of its fallacious argument that Rule 24(a)(2) governs here, the situation at hand would not give Eastern a right to intervene. The Rule demands that two conditions be satisfied: that Eastern "is or may be bound by a judgment" entered by the First Circuit, and that representation of Eastern's interests by existing parties to the appeal "is or may be inadequate." Neither condition is satisfied in this case.

a. Eastern can be "bound" within the meaning of Rule 24(a)(2) only if some legally cognizable right or interest of Eastern is involved in the proceeding in the court below. The proceeding below—unlike the cases Eastern relies on as precedent[9]—in no way involves Eastern's right to operate. The order under review did not grant Eastern certificate authority; nor did the order deny Eastern authority or modify its existing

[9] It should be noted that *all* the cases Eastern cites in its footnote 1 (Pet. 10), in support of its statement that "a competing carrier", with a "direct and substantial interest in the preservation of a CAB decision in a route case" has a right to intervene, are cases where the intervening carrier was granted authority to fly by the Board order it sought to protect. In none of those cases was intervention allowed to a carrier whose sole interest was to rid itself of competition.

certificate. Eastern's sole interest in the order is that it would eliminate a competitor. As a matter of law, any economic damage to Eastern which may result from a renewal of Northeast's certificate would not constitute a modification or dilution of Eastern's certificate rights. *Delta Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 275 F.2d 632, 641 (D.C. Cir. 1959), *cert. denied sub nom., Trans World Airlines, Inc.* v. *Delta Air Lines, Inc.*, 362 U.S. 969 (1960).[10]

Faced with this lack of a legally cognizable interest, Eastern is reduced to making the following contention as to why it is "bound"—so long as the Board order is stayed, and thereafter if the order be set aside, Eastern cannot obtain injunctive relief under § 1007 of the Federal Aviation Act, 49 U.S.C. § 1487, on the ground that Northeast is flying to Florida without certificate authority.[11]

But the fact that § 1007 of the Act gives Eastern the right of a "private attorney general" to sue to enjoin violations of certificate authority by a competitor in no way implies that Eastern has a "right" to participate in all proceedings to determine the scope of such authority. The right of a competitor to enjoin flights

---

[10] For the sake of realism, it should be noted that the vast amounts which Eastern claims it is losing are actually the hypothetical additional profits which Eastern hopes to make as a result of elimination of the competition of Northeast—certainly chickens which have not hatched.

[11] Eastern contradicted its present position in its abortive appearance before the Florida district court, where Eastern argued that in its § 1007 action it was not "bound" by the review proceedings and stay issued below—the precise opposite of the argument Eastern now sets forth before this Court. See p. 6, *supra*.

in violation of Board orders by necessity must await final determination of the validity of those orders; clearly there can be no right to enforce an erroneous Board order. In other words, Eastern would have the right under § 1007 to enjoin Northeast from flying in violation of its certificate as finally determined, but whether Northeast is flying in violation of its certificate is not in issue before the First Circuit. The only issue that was before the Board, and the only issue currently under review by the First Circuit, is the purely public issue of whether the renewal of Northeast's authority is in accordance with the "*public* convenience and necessity."[12]

b. Nor does Eastern meet the other requirement of Rule 24(a)(2)—that "the representation of the applicant's interest by existing parties is or may be inadequate."[13] Eastern bases its claim of inadequate representation on the premise that the Department of Justice may prevent the Board from appearing as party respondent to defend its order. That premise is not only absurd—it is refuted by the Board's Memo-

[12] Analogous attempts of would-be intervenors to gain access to pending litigation have been denied by this Court on the ground that the applicants would not be "bound". In the recent case of *Sam Fox Publ. Co. v. United States*, 366 U.S. 683 (1961), this Court separated the private interest of Sam Fox from the purely public interest being vindicated by the United States through an antitrust consent decree. Even though Sam Fox was one of the class whose competitive interests the decree was designed to protect, this Court concluded that Sam Fox had no stake in, and was not bound by, the adjudication of that public interest. A like conclusion must obtain here. See also *Sutphin Estates, Inc. v. United States*, 342 U.S. 19 (1951).

[13] As shown above, Eastern has no legally cognizable "interest" in this appeal, any more than do some forty other parties to the Board proceeding which led to the order under review.

randum (see note 3, p. 3 thereof). And, if the Board should at any time default, Eastern can then seek intervention at that time. See *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944); *Pellegrino* v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953).[11]

Moreover, Eastern's allegation that its interests may be inadequately represented seemingly fails to take account of its right, granted by the First Circuit, to participate in the appeal as an *amicus curiae*. This gives Eastern the opportunity to present its views fully to the court below.

3. The above discussion disposes of Eastern's claim that it is entitled to intervene in the statutory review proceeding below as a matter of right. The matter was one for the exercise of the First Circuit's discretion and, unless it abused that discretion, its order denying intervention is not appealable to this Court. *Brotherhood of Railway Trainmen* v. *Baltimore & O. R. Co.*, 331 U.S. 519, 524-525 (1947).

The First Circuit, in denying Eastern leave to intervene, was applying accepted standards of discretion laid down in similar cases which have concluded that the agency which promulgated the order under review "can take care of itself," and that additional argument of private parties who seek to defend the agency's order "would be repetitious and cumulative." *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, *supra*, at 342. Parties who are in agreement with the order being reviewed and who seek to join with the agency on appeal simply are not aggrieved by such order. *Amalgamated Meat Cutters* v. *National Labor*

[11] This consideration points up the premature nature of the present petition. See p. 16, *infra*.

Rel. Bd., 267 F.2d 169 (1st Cir.), *cert. denied sub nom., Geilich Tanning Co.* v. *Amalgamated Meat Cutters*, 361 U.S. 863 (1959), and may adequately express their views to the court by appearing as *amici curiae*. *Haleston Drug Stores, Inc.* v. *National Labor Rel. Bd.*, 190 F.2d 1022 (9th Cir. 1950), *cert. denied*, 342 U.S. 815 (1951).

Proceedings before the Board frequently involve numerous parties who are granted leave to appear in order to make their interests known and placed in the record. In the Northeast renewal proceeding, about forty such parties appeared—chambers of commerce, unions, municipalities, airlines, etc. It surely lies within the discretion of the reviewing court to decide that the appeal will be muddied rather than clarified by allowing these interests to participate as parties. Eastern, which hopes to benefit economically from the Board's order, certainly presents a less compelling claim for intervention than those participants before the Board who will be injured by that order, such as the two unions whose motions to intervene were also denied by the same October 17 order of which Eastern complains.

In the light of these circumstances the court below did not abuse its discretion in limiting Eastern to the filing of a brief *amicus*. In any event, the appropriateness of the exercise of such discretion hardly warrant the attention of this Court.[15]

---

[15] The fact that other courts in other circumstances have allowed intervention in proceedings reviewing Board orders (see Pet. 10, note 1) does not give any basis for concluding that the court below abused its discretion in this case, nor does it mean that there is any conflict. As Eastern concedes, the question of whether intervention was proper was not raised or considered in those cases. In addition, the cases are patently distinguishable. See note 9, *supra*.

4. Finally, Eastern's request for review of the denial of intervention is premature. The court below has not ruled that Eastern may never intervene, regardless of the circumstances—it has simply said that Eastern may not intervene "at this stage", *i.e.*, at the outset of the review. Such disposition is entirely sensible.

If the order of the Board is affirmed by the court below, Eastern will have no cause to complain, and review of the intervention issue now "would have been an idle gesture." *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142 (1944). On the other hand, if the Board's order is set aside, the Board may petition for review in this Court, and Eastern again will have no cause to complain. Meanwhile there is no need to speculate. If the concerns Eastern expresses should somehow become realities to its prejudice, it will be time enough for Eastern to seek relief by a new application for intervention in the court below. *Cf.*, *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944); *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9th Cir. 1953).[16]

II. *The Stay Issue.* On the stay issue, Eastern's present petition simply repeats almost verbatim the points it urged in No. 756 Misc. The reasons why those points do not warrant the attention of this Court were

---

[16] Any claim of abuse of discretion in denying Eastern leave to intervene can only be determined "in the light of the whole record" on appeal, for such claim should not be considered if "examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented." *Allen Calculators, Inc.* v. *National Cash Register Co.*, *supra*. Eastern's allegations are "too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion" prior to the determination of the merits below. *Saltpeter Estates, Inc.* v. *United States*, 342 U.S. 19, 23 (1951).

fully developed in the responses filed in that docket by Northeast, its employees, and the Board, and need not be discussed at length again. We respectfully refer the Court to those responses and simply state in summary:

1. Eastern's claim that the court below erred in granting the stay at least to April 30, 1964, rather than *pendente lite* alone, presents an abstract question which there is no practical reason or need for this Court to review. As the Board advised this Court in No. 756 Misc. and states again in its Memorandum in the present No. 720, the case will not be argued before March, and "there appears to be no likelihood" that the inclusion of the April 30 date "will permit Northeast to operate beyond the period of judicial review". The case will thus still be *pendente lite* on April 30 and the inclusion of that date in the stay accordingly has no legal significance.

2. In its other contention concerning the stay—that the court below erred in issuing any stay at all—Eastern is simply asking this Court to review the manner in which discretion was exercised below. Plainly that contention presents no substantial question warranting review.

CONCLUSION

There is thus no basis for Eastern's sweeping and unsupported statements that issues of "paramount importance to the operations of all regulatory agencies" and "conflicts" are posed by this case. Pet. 19. The court below, in the exercise of the discretion and power conferred upon it, acted discretely on the particular factual situation before it in granting the stay and in limiting Eastern to participation as *amicus*. In

issuing those interlocutory orders, the court applied accepted standards and did not lay down any new or important principles of general application. Accordingly, for the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY E. FOLEY
10 Post Office Square
Boston, Massachusetts 02109

JOHN H. PICKERING
900 17th Street, N. W.
Washington, D. C. 20006

Attorneys for
Northeast Airlines, Inc.

FOLEY, HOAG & ELIOT
10 Post Office Square
Boston, Massachusetts 02109

WILMER, CUTLER & PICKERING
900 17th Street, N. W.
Washington, D. C. 20006

Of Counsel

February 1, 1964